SCOTCH LEASING SDN. BHD.

v.

CHEE POK CHOY & ORS.

SUPREME COURT, KUALA LUMPUR
CHONG SIEW FAI CJ (SABAH & SARAWAK)
PEH SWEE CHIN FCJ
ABU MANSOR ALI JCA
[CIVIL APPEAL NO: 02-41-94]
14 DECEMBER 1996

CIVIL PROCEDURE: *Judgments and orders - Perfected order - Order made after a hearing inter partes - Whether could be set aside - Whether Court already functus officio - Non-revocability of a perfected order - General rule*

CIVIL PROCEDURE: *Judgments and orders - Objection - Order of sale of land held under Land Office title - Order made by High Court - Order not appealed against - Objection on point of jurisdiction - Whether could be raised after order had been perfected*

The appellant, the chargee of a piece of land held under the Land Office title, had applied for an order of sale of the charged land, and on 3 September 1991 the High Court granted the order following a contested hearing thereof. The order was subsequently perfected and no appeal was filed against it. On 8 June 1992, i.e. some nine months later, the chargors applied to the same Court to set aside the order, and argued for the first time that the High Court lacked jurisdiction to make the order and that the order ought to have been made by a Land Administrator instead. The learned Judge allowed the application and so set the order aside. The chargee appealed and argued that the order, having been perfected and not appealed against, was a final order, with the result that the learned Judge was already *functus officio* and had no power to set it aside.

It was not in dipute that the chargee's argument aforesaid was in full accord with the Supreme Court decision in *MUI Bank Bhd v. Cheam Kim Yee (Beh Sai Ming, Intervener).* The chargor contended, nonetheless, that *MUI Bank* ran counter to the *ratio* in *Muniandy a/l Thamban Kaundan & Anor v. Development & Commercial Bank & Anor,* as the Supreme Court in that latter case had ruled that the learned Judge could still set aside the order even after it has been perfected. Before the learned appeal Judges questions arose as to (i) the revocability by another Judge subsequently of an order made by an earlier Judge and since perfected (ii) the actual stages of a case where an objection on point of jurisdiction of the Court could be raised by a defendant.

Held:

Per Peh Swee Chin FCJ

[1] The *ratio* in *MUI Bank* is more familiar and well-settled. It is in fact supported by a number of authorities including *Hock Hua Bank Bhd v. Sahari bin Murid, Oversea-Chinese Banking Corpn Ltd v. Sindoma Realty Sdn Bhd, Syarikat Marak Jaya Sdn Bhd v. Syarikat Masinda Sdn Bhd* and a host of others.

[2] What the Supreme Court in *Muniandy* held was that the *MUI Bank's ratio* was subject to certain exceptions and one of the exceptions applied. In the event the Supreme Court found the order of sale therein to be a nullity for non-service of notice of adjourned hearing on the chargors, as the order of sale was an *ex parte* order made in the absence of the chargors. And it was consequently held that the Judge, in such circumstances of non-service, was not *functus officio* and could set aside the order not only in exercise of his inherent jurisdiction but also on ground of breach of natural justice.

[3] We are in agreement with both decisions of the Supreme Court in *Muniandy* and *MUI Bank*, and we may add, there is no conflict between them. The exercise of inherent jurisdiction in *Muniandy* is perhaps an alternative to O. 28 r. 4(1) which seems to provide expressly for the situation arising in that case.

[4] There is no question here of any order being made *ex parte* as the order of sale was made after hearing Counsel for both parties.

[5] The general rule about the non-revocability of a perfected order, subject to exceptions in the Rules of the High Court etc., is a formidable obstacle to the chargors herein unless the point of jurisdiction could be allowed to be raised at the stage when it was so raised.

[6] The point on jurisdiction was not raised before the order for sale was made on 3 September 1991, but raised only as an afterthought in a subsequent summons in the same case filed on 8 June 1992. This offended the general rule as stated in the *MUI Bank* case, and further, it did not come within the exception to the general rule as in *Muniandy*.

[7] We do not think that the point on jurisdiction could be so raised and acted upon by the Judge. It could have been raised on appeal but no appeal was filed against the order of sale. It could also be reviewed but only before an appeal was filed and before the order of sale was perfected. In any case, to allow the learned Judge in the Court below to re-open the matter 9 months after it was decided by himself would bring absolute chaos to the judicial system.

[8] The learned Judge had no jurisdiction the hear the application dated 8 June 1992 to set aside the order of sale dated 3 September 1991. If the application to so set aside could not be entertained by the Court in the first place, then any legal argument in support of such application to so set aside, should it proceed, ex necessitate, could not have been entertainable, lying as it did, outside the threshold of the Court. The necessary consequence was that this appeal was not properly before this Court, being an appeal for an order made at a hearing which was an exercise in futility.

[Appeal allowed. Order of Court below set aside.]

*[**Bahasa Malaysia** translation of headnotes]*

PROSEDUR SIVIL: *Penghakiman dan perintah - Perintah yang diperbaiki - Perintah dibuat selepas perbicaraan inter partes - Samada boleh diketepikan - Samada Mahkamah telah pun functus officio - Perintah yang telah disempurnakan tak boleh dibatalkan - Kaedah umum*

PROSEDUR SIVIL: *Penghakiman dan perintah - Bantahan - Perintah penjualan tanah di bawah pegangan hakmilik Pejabat Tanah - Perintah dibuat oleh Mahkamah Tinggi - Perintah tidak dirayui - Bantahan mengenai perkara bidangkuasa - Samada boleh dibangkitkan selepas perintah telah disempurnakan*

Perayu, yang merupakan pemegang gadaian sebidang tanah di bawah pegangan hakmilik Pejabat Tanah, telah memohon untuk mendapatkan perintah jualan akan tanah yang tergadai itu, dan pada 3 September 1991 Mahkamah Tinggi telah memberi perintah yang dipohon berikutan satu perbicaraan inter partes. Perintah itu telah kemudiannya disempurnakan dan tiada rayuan difail terhadapnya. Pada 8 Jun 1992, lebih kurang 9 bulan kemudiannya, penggadai telah memohon kepada Mahkamah yang sama untuk mengenepikan perintah itu, dan berhujah buat pertama kalinya bahawa Mahkamah Tinggi ketiadaan bidangkuasa untuk membuat perintah tersebut dan bahawa perintah itu seharusnya dibuat oleh Pentadbir Tanah. Hakim yang bijaksana telah membenarkan permohonan ini, dan dengan itu mengenepikan perintah tersebut. Pemegang gadaian telah merayu dan berhujah bahawa perintah jualan itu, setelah disempurnakan dan tidak dirayui, adalah merupakan perintah yang muktamad, yang mengakibatkan bahawa Hakim yang bijaksana telah pun *functus officio* dan tidak mempunyai kuasa untuk mengenepikannya.

Tidak dipertikaikan bahawa penghujahan pemegang gadaian adalah sejajar dengan keputusan Mahkamah Agung dalam *MUI Bank Bhd v. Cheam Kim Yee* (*Beh Sai Ming, Pencelah).* Penggadai bagaimanapun telah menegaskan, bahawa keputusan dalam *MUI Bank* adalah berlawanan dengan *ratio* dalam *Muniady a/l Thamban Kaundan & Anor. v. Development & Commercial Bank & Anor,* kerana Mahkamah Agung dalam kes yang terkemudian itu telah

memutuskan bahawa Hakim yang bijaksana masih boleh mengenepikan perintah sedemikian walaupun selepas ianya disempurnakan. Di hadapan Hakim-hakim rayuan yang bijaksana persoalan-persoalan telah berbangkit berhubung dengan (i) sifat boleh batal oleh seorang Hakim yang lain akan suatu perintah yang telah dibuat oleh seorang Hakim yang lebih awal dan sejak itu telah disempurnakan (ii) peringkat sebenar di mana suatu bantahan ke atas perkara bidangkuasa Mahkamah boleh dibangkitkan oleh defendan.

Diputuskan:

Oleh Peh Swee Chin HMP

[1] *Ratio* dalam kes *MUI Bank* adalah lebih dikenali dan lebih tegap. Ianya malah disokong oleh beberapa autoriti termasuk *Hock Hua Bank Bhd v. Sahari bin Murid, Oversea-Chinese Banking Corpn Ltd v. Sindoma Realty Sdn Bhd., Syarikat Marak Jaya sdn Bhd. v. Syarikat Masinda Sdn Bhd*. dan banyak lagi.

[2] Apa yang telah diputuskan oleh Mahkamah Agung dalam kes *Muniandy* adalah bahawa *ratio MUI Bank* adalah tertakluk kepada beberapa pengecualian dan satu daripada pengecualian itu terpakai. Oleh yang demikian Mahkamah Agung mendapati perintah jualan di situ adalah suatu pembatalan di sebabkan oleh ketidak-sampaian notis penangguhan perbicaraan ke atas penggadai, oleh kerana perintah jualan itu merupakan suatu perintah *ex parte* yang telah dibuat dalam ketiadaan penggadai. Dan akibatnya telah diputuskan bahawa Hakim, dalam keadaan ketidaksampaian itu, adalah tidak *functus officio* dan boleh mengenepikan perintah itu bukan sahaja dalam melaksanakan bidangkuasanya tetapi juga atas alasan kemungkiran keadilan asasi.

[3] Kami bersetuju dengan kedua-dua keputusan Mahkamah Agung dalam *Muniandy* dan *MUI Bank*, dan boleh kami tambah, tidak terdapat apa-apa konflik diantara mereka. Pelaksanaan bidangkuasa sedia ada dalam *Muniandy* adalah mungkin suatu alternatif kepada A. 28 k. 4(1) yang mana kelihatan sebagai memperuntukkan secara nyatanya bagi situasi yang berbangkit dalam kes itu.

[4] Tidak timbul persoalan di sini mengenai mana-mana perintah yang telah dibuat secara *ex parte* kerana perintah jualan telah dibuat selepas mendengar Peguam bagi kedua-dua pihak.

[5] Kaedah umum mengenai sifat tidak boleh batal perintah yang telah disempurnakan, tertakluk kepada kekecualian dalam Kaedah-kaedah Mahkamah Tinggi etc., adalah merupakan suatu halangan yang sukar diatasi oleh penggadai di sini kecuali halperkara bidangkuasa boleh dibenarkan untuk dibangkitkan di peringkat di mana ianya telah dibangkitkan di sini.

[6] Halperkara bidangkuasa telah tidak dibangkitkan sebelum perintah jualan dibuat pada 3 September 1991, tetapi hanya dibangkitkan sebagai sesuatu yang difikirkan kemudian dalam satu saman yang berikutnya dalam kes sama yang telah difailkan pada 8 Jun 1992. Ini menyalahi kaedah umum sepertimana yang dinyatakan dalam kes *MUI Bank*, dan seterusnya, ianya tidak termasuk dalam lingkungan kekecualian kepada kaedah umum sepertimana yang terdapat dalam kes *Muniandy*.

[7] Kami tidak fikir bahawa perkara berhubung dengan bidangkuasa boleh dibangkitkan dan diambil tindakan oleh Hakim sepertimana yang berlaku di sini. Ianya mungkin boleh dibangkitkan melalui rayuan tetapi tiada rayuan difailkan terhadap perintah jualan tersebut. Ianya juga boleh dikaji semula tetapi hanya sebelum sesuatu rayuan difailkan dan sebelum perintah untuk jualan itu disempurnakan. Dalam apa keadaan pun, bagi membenarkan Hakim yang bijaksana dalam Mahkamah di bawah untuk membuka semula perkara tersebut 9 bulan selepas ianya telah diputuskan olehnya akan menyebabkan huru-hara kepada sistem kehakiman.

[8] Hakim yang bijaksana tidak mempunyai bidangkuasa untuk mendengar permohonan bertarikh 8 June 1992 untuk mengenepikan perintah jualan bertarikh 3 September 1991. Ianya mengikut bahawa, jika permohonan untuk mengenepikan itu tidak boleh dilayan oleh Mahkamah pada awalnya, maka semua hujah undang-undang yang dibuat bagi menyokong permohonan tersebut, jika dibangkitkan, ex necessitate, tidak harus dilayani kerana berada diluar bidang Mahkamah. Akibatnya ialah, rayuan semasa ini telah dibawa ke Mahkamah ini dengan cara yang tidak wajar kerana merupakan rayuan terhadap satu perintah yang dibuat dalam satu perbicaraan yang sia-sia.

[Rayuan dibenarkan. Perintah Mahkamah di bawah diketepikan.]

Cases referred to:

MUI Bank Bhd. v. Cheam Kim Yee (Beh Sai Ming, intervener) [1991] 2 MLJ 642 ***(foll)***

Muniandy a/l Thamba Kaundan & Anor. v. Development & Commercial Bank Bhd. & Anor. [1996] 2 CLJ 586 ***(foll)***

Hock Hua Bank Bhd v. Sahari bin Murid [1981] 1 MLJ 143 ***(refd)***

Oversea-Chinese Banking Corpn. Ltd. v. Sindoma Realty Sdn. Bhd. [1989] 1 MLJ 377 ***(refd)***

Syarikat Marak Jaya Sdn. Bhd. v. Syarikat Masinda Sdn. Bhd. [1991] 2 MLJ 417 ***(refd)***

United Asian Bank Bhd. v. Elgi Marka Sdn. Bhd. [1995] 1 AMR 244 ***(refd)***

Tan Teng Pan v. Wong Fook Shang [1973] 1 MLJ 31 ***(refd)***

Re Harrison's Settlement [1955] 1 All ER 185 ***(refd)***

Asia Commercial Finance (M) Bhd. v. Kawal Teliti Sdn. Bhd. [1995] 3 CLJ 783 ***(refd)***
Isaacs v. Robertson [1984] 3 All ER 140 ***(refd)***
Phuah Bee Hong v. Pentadbir Tanah, Daerah Wilayah Persekutuan Kuala Lumpur [1994] 2 CLJ 705 ***(cit)***

Legislation referred to:
Evidence Act 1950, s. 114(e)
Rules of the High Court 1980 O. 28 r. 4(1)

[Appeal from High Court Malaya, Kuala Lumpur; Civil Suit No: F31-92-1986]

For the appellant - T.Y. Teh Tse Yee; M/s. T.Y. Teh & Partners
For the respondents - Segaram; M/s. Syarikat M. Segaram

JUDGMENT

Peh Swee Chin FCJ:

This appeal brings to light once more, two familiar questions but in somewhat different circumstances. The first of these questions is the revocability by another Judge subsequently of an order made by an earlier Judge and since perfected, and the other question is to the actual stages of a case where an objection on the point of jurisdiction of the Court can be raised by a defendant.

A brief history of the case be necessary to show how these two questions have arisen.

The appellant, the charges of a piece of land under land office title, applied by originating summons to the High Court for an order of sale of the said land owned and charged by the respondents, (hereinafter called the chargors), in favour of the appellant, (hereinafter called the chargee). It will have been noticed that the Land Administrator of the district in which the said land is situated would have been the proper authority to hear the application for an order of sale of the charged land under a land office title.

The said originating summons concerned in this appeal was duly fixed for hearing and it came up for a contested hearing inter parties in chambers on 3 September 1991, more specifically, in the presence of Counsel for both parties and an order of sale with consequential directions was made on the same day by the learned Judge.

The said order dated 3 September 1991 was subsequently extracted or perfected and no appeal was filed by either party against the said order within the time provided for such appeal.

Apparently, the chargors later had a "brain wave" and filed a summons-in-chambers dated 8 June 1992, i.e. about 9 months later, in the same Court for an order that the said order of sale dated 3 September 1991 be set aside and as is evident from the affidavit of Chu Akau @ Chooi Ah Kow affirmed on 8 June 1992, on a point of jurisdiction raised for the time that the High Court had no jurisdiction to make the said order of sale on 3 September 1991 and that such an order should have been made by the Land Administrator in pursuance of the provisions of the National Land Code 1965. The Court, (in fact incidentally, the same learned Judge who made the order of sale), after hearing the parties on 17 September 1992, set aside the order of sale on 17 September 1992. Hence this appeal before us by the chargee.

Before us, it was argued for the chargee, relying in particular, on a judgment of the Supreme Court in *MUI Bank Bhd. v. Cheam Kim Yee (Beh Sai Ming,* intervener) [1991] 2 MLJ 642 to the effect that an order of sale of charged land was a final order unless appealed against and once it was made, drawn up and perfected, the learned Judge was *functus officio* and therefore had no power to set aside the order of sale. Thus, going by the judgment, the learned Judge in the Court below concerned herein had no power to hear and make the order appealed from.

It was argued on behalf of the chargors that the learned Judge had power to set aside the order of sale even though it was perfected and another judgment of the Supreme Court in *Muniandy a/l Thamba Kaundan & Anor. v. Development & Commercial Bank Bhd. & Anor.* [1996] 1 AMR 908 was cited in support.

The *ratio* of MUI Bank, *supra,* is more familiar and well-settled, and it is in fact supported by a number of authorities including *Hock Hua Bank Bhd. v. Sahari bin Murid* [1981] 1 MLJ 143 FC; *Oversea-Chinese Banking Corpn. Ltd. v. Sindoma Realty Sdn. Bhd.* [1989] 1 MLJ 377; *Syarikat Marak Jaya Sdn. Bhd. v. Syarikat Masinda Sdn. Bhd.* [1991] 2 MLJ 417 and a host of others.

We look into *Muniandy*, *supra*. There, an order of sale of charged land was also involved and the chargor applied to set it aside for which the *MUI Bank* case, *supra*, was cited in opposition. The Supreme Court found that the *MUI Bank's ratio* was subject to certain exceptions and one of the exceptions applied, i.e. that the Supreme Court found the order of sale therein to be a nullity for non-service of notice of adjourned hearing on the chargors as the order of sale was an *ex parte* order made in the absence of the chargors, where the application for it was heard *ex parte*. The Supreme Court held (pp. 915 - 918) that the Judge in such circumstances of non-service was not

functus officio and he could set the order aside in the exercise of its inherent jurisdiction on the ground that it was a nullity and on the further ground it was a breach of the rule of natural justice of being deprived of an opportunity of being heard.

With great respect, we are in agreement with both decision of the Supreme Court, and we may add there is no conflict between them and that the exercise of inherent jurisdiction in *Muniandy* is perhaps an alternative to O. 28 r. 4(1) which seems to provide expressly for the situation arising in *Muniandy supra*:

> Order 28 r. 4(1): The Court by whom an originating summons is heard may, if the liability of the defendant to the plaintiff in respect of any claim made by the plaintiff is established, make such order in favour of the plaintiff as the nature of the case may require, but where the Court makes an order under this paragraph against a defendant who does not appear at the hearing the order may be varied or revoked by a subsequent order of the Court on such terms as it thinks just.

In the instant appeal, there is no question of any order made *ex parte* involved for the order of sale was made after hearing Counsel for both parties. The general rule about the non-revocability of a perfected order, subject to exceptions contained in the Rules of the High Court, etc. is still a formidable obstacle to the chargors herein unless the point of jurisdiction could be allowed to be raised at the stage when it was so raised.

On the point that the High Court had no jurisdiction to make an order of sale in the case of land held under a Land Office title, the point seems to be well-founded, see *United Asian Bank Bhd. v. Elgi Marka Sdn. Bhd.* [1995] 1 AMR 244 and *Tan Teng Pan v. Wong Fook Shang* [1973] 1 MLJ 31.

This point of jurisdiction can be raised on appeal, of course, and it goes without saying a *fortiori* it can be raised in a Court of first instance. This point was raised before us, and it was in fact also raised before the learned Judge in the Court below. However, in the circumstances of this case as set out below, one cannot yet say *cadit quaestio*.

In so far as it was raised before the learned Judge, it was not raised before the order of sale was made on 3 September 1991. That order of sale, in fact has never been appealed against.

It was raised in a subsequent summons in the same case as an afterthought, filed on 8 June 1992, thus offending the general rule stated in the *MUI Bank* case, *supra*, and also not coming within the exception to such general rule as in *Muniandy, supra*.

We do not think it could be so raised and acted on by the Judge. It could have, of course been raised on appeal if an appeal was filed against the order of sale made on 3 September 1991. If before such an appeal was filed and before the said order of sale was perfected, it could be also reviewed by the

Court in exercise of its inherent jurisdiction; see *Re Harrison's Settlement*, [1955] 1 All ER 185; and *Syarikat Marak Jaya, supra.*

To allow the learned Judge in the Court below to re-open the matter nine months after it was decided by himself, (and for that matter any other Judge), a Court would have to allow, equally, another Judge exercising an co-ordinate jurisdiction to set it aside on the same jurisdiction point after, say, twenty years, in the same case, for food for a goose is also food for geese. This would bring absolute chaos to our judicial system which does not carry on in such fanciful way as contended by learned Counsel for the chargors.

Such chaotic condition is prevented by several things.

First, a jurisdiction point is no less an issue than other issues in civil litigation. If not raised at the hearing in the Court of first instance or on appeal, it cannot be raised thereafter, for the doctrine of *res judicata* sets in.

Res judicata has been explained before e.g. see *Asia Commercial Finance (M) Bhd. v. Kawal Teliti Sdn. Bhd.* [1995] 3 MLJ 189 SC.

When the jurisdiction point in question was not raised before the learned Judge before he made the order of sale on 3 September 1991, when he heard the matter *inter parties* or at any rate, if it was not raised for review before the said order was perfected, the requirements of a proceeding in an adversarial system were complied with and satisfied unless the learned Judge exceptionally took the jurisdiction point on his own initiative, if he so minded, before the said order of sale was made. We mentioned the adversarial system because in it, a court generally, would leave it to the parties in litigation to conduct their respective cases as best as they could without interference.

It is to be remembered in this connection that a superior Court like the High Court is "a Court of unlimited jurisdiction in the course of contentious litigation" as stated by Lord Diplock in *Isaacs v. Robertson* [1984] 3 All ER 140, 143, when referring to a High Court as such a Court in connection with the requirement that a High Court's order must be obeyed and could only be challenged in a direct application to set it aside. This was followed by the Supreme Court in *Phuah Bee Hong v. Pentadbir Tanah, Daerah Wilayah Persekutuan Kuala Lumpur* [1994] 2 CLJ 705.

We may add that under s. 114(e) of the Evidence Act 1950, one can presume that the High Court has such attributed jurisdiction unless rebutted. We say this in connection with our description of such a jurisdiction point as being ordinarily an issue in litigation.

If the learned Judge had no jurisdiction on 17 September 1992 to hear the application dated 8 June 1992 to set aside the said order of sale dated 3 September 1991, the application to so set aside could not have been entertained by the Court in the first place, then any legal argument in support of such application to so set aside, should it proceed, *ex necessitate*, could not have been entertainable, lying, as it did, outside the threshold of the Court.

As a necessary consequence, this appeal is not properly before us, it being an appeal from an order made at a hearing which was an exercise in futility.

We therefore allow the appeal, setting aside the order of the Court below dated 17 September 1992, with costs here and below to be paid by the chargors, *viz.* the respondents. Deposit is to be paid to the appellant to account of costs.

Reported by W.A. Sharif